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PLAINTIFF'S EXHIBIT

Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. —

JESSIE BALL duPONT, EDWARD BALL, FLORIDA NATIONAL BANK OF JACKSONVILLE and ELBERT DENT, as Trustees of the Testamentary Trust Created under and by Virtue of the Last Will and Testament and Codicils thereto of ALFRED I. duPONT, Deceased, and EDWARD BALL, ROGER L. MAIN, JESSIE BALL duPONT, HOWARD S. WHEELER, PAUL L. PIERCE, CLYDE C. PIERCE, WALTER P. FULLER, S. WALLACE SHAFER, ST. JOE PAPER COMPANY, LEEDY, WHEELER & ALLEMAN, INC., and CLYDE C. PIERCE CORPORATION,

Petitioners,

v.

THE CRUMMER COMPANY AND R. E. CRUMMER & COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit, which reversed a judgment of the United States District Court for the Northern District of Florida holding that an action brought by the respondents seeking treble damages for injury

arising from an alleged conspiracy under the antitrust laws was barred by the applicable statute of limitations.

OPINIONS BELOW

The opinion of the District Court (App., pp. 1a-7a) is reported at 148 F. Supp. 255. The opinion of the Court of Appeals (App., pp. 8a-20a) is reported at 255 F. 2d 425. Earlier and related opinions of the District Court and the Court of Appeals are reported at 117 F. Supp. 870 and 223 F.2d 238.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1958 (App., p. 21a). A timely petition for rehearing was denied on June 17, 1958 (R. 4087). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

This is a suit under the antitrust laws to recover treble damages for injuries claimed to have resulted from an alleged conspiracy. The claim is admittedly barred by the applicable statute of limitations unless the statute was tolled by reason of alleged fraudulent concealment of the cause of action.

The issue of fraudulent concealment turns on a single overt act claimed to have been committed pursuant to the alleged conspiracy. The act was the filing of a memorandum by two of the alleged conspirators with the Post Office Department which directed the Department's attention to certain activities of the respondents in relation to the refunding of municipal bond issues. In the trial on the issue of fraudulent concealment, respondents did not assert or show that the memorandum was false or otherwise without basis but

took the position that the truth or falsity of the memorandum was immaterial.

The District Court held that the submission of the memorandum was not a conspiratorial act and that the failure of the petitioners to disclose the submission did not of itself constitute fraudulent concealment. The District Court also held that, except for this single overt act, the respondents had knowledge of the activities alleged to constitute the conspiracy. The Court of Appeals reversed, holding that the non-disclosure of the submission of the memorandum to the Post Office Department was as a matter of law sufficient evidence to establish fraudulent concealment and to toll the statute of limitations and that the respondents were without knowledge of their alleged cause of action because they did not know the identity of the persons who had filed the memorandum.

The questions presented are:

1. Whether in an antitrust conspiracy case the submission of a truthful memorandum directing the attention of a federal agency to possible violations of federal criminal statutes on the part of the plaintiffs can constitute a basis for liability under the antitrust laws so that the concealment of the submission of the memorandum, if proved to be fraudulent, can toll the statute of limitations.

2. Whether the failure to disclose the submission of such a memorandum constitutes in itself, and without any additional proof of fraud or contrivance, an act of fraudulent concealment which tolls the statute of limitations.

3. Whether in an antitrust conspiracy case the applicable statute of limitations is tolled by the doctrine

of fraudulent concealment if the plaintiffs' alleged lack of knowledge relates only to one of many alleged overt acts and to the identity of two of numerous alleged co-conspirators.

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act (Act of July 2, 1890, 26 Stat. 209, as amended 15 U.S.C. §§ 1, 2), Section 4 of the Clayton Act (Act of October 15, 1914, 38 Stat. 731, 15 U.S.C. § 15), Florida Statutes Annotated § 95.11(5)(a), and the Federal Moratorium Act (Act of October 10, 1942, 56 Stat. 781, as amended 15 U.S.C. note following § 16). The texts of these statutes are set forth in the Appendix at pages 22a-23a.

STATEMENT

The respondents filed their original complaint in the United States District Court on December 19, 1949, seeking treble damages in the amount of $30,000,000 for injuries alleged to have been inflicted upon them in violation of the antitrust laws. The complaint charged that petitioners and others had combined and conspired, beginning early in 1941, to injure the business of the Crummer companies as dealers in municipal bonds (R. 21-77). Petitioners' answers defended on the ground, among others, that the action was barred by the three-year Florida statute of limitations (Fla. Stat. Ann. § 95.11(5)(a)). The District Court held that this statute was applicable, that the three-year period began to run on June 30, 1946, the date of the end of the Federal Moratorium Act, and that the statute barred respondents' claim unless it was tolled by the doctrine of fraudulent concealment (R. 453-54).

Thereafter the District Court held that the complaint did not allege sufficient facts to raise the issue of fraudulent concealment and dismissed the complaint (R. 454-68). Subsequently the District Court also dismissed an amended complaint in which respondents sought to allege additional facts relating to fraudulent concealment (R. 468-71). On appeal, the United States Court of Appeals for the Fifth Circuit held that the amended complaint alleged sufficient facts to raise an issue of fraudulent concealment. 223 F.2d 238 (5th Cir. 1955). A petition for a writ of certiorari filed by the respondents raising other issues was denied. 350 U.S. 848.

On remand, the District Court set the issue of fraudulent concealment for a separate trial (R. 501-02). By a pretrial order the court provided that for the purpose of the separate trial on the single issue of fraudulent concealment it would not be necessary for the plaintiffs to prove that a conspiracy to violate the antitrust laws existed among the defendants or that damages were sustained by the plaintiffs as a result of the conspiracy (R. 501-02).

In the pretrial proceedings the District Court directed the parties to submit written statements of their positions on the issue of fraudulent concealment. The statement filed by the respondents based their claim of fraudulent concealment solely on the filing of a memorandum by petitioners Wheeler and Main with the Post Office Department on May 21, 1941 (R. 522-23). The memorandum, which is set forth in full in the Appendix to this petition (App., pp. 24a-29a), directed the attention of that Department to respondents' use of the mails in connection with the refunding of a municipal

bond issue by Lee County, Florida (R. 3125-32).[1] Respondents' amended complaint showed that they had had knowledge since early 1945 that some such memorandum had been filed (R. 87-89). In their statement of the issues at pretrial, however, the respondents relied on the failure of the petitioners to disclose the submission of the memorandum and on the inability of the respondents by diligent search to discover prior to January, 1947 the identity of the persons who submitted, and the nature of, the memorandum (R. 519-25, 546-47). In the same statement the respondents took the position that the truth or falsity of the memorandum was irrelevant and immaterial (R. 522).

At the trial the respondents introduced evidence in support of the contentions as set forth in their statement of the issues, together with certain other evidence incidental to those issues. The petitioners introduced

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[1] The activities of the Crummer companies as dealers in Florida municipal bonds were also the subject of litigation which culminated in the decision of this Court in American Insurance Company v. Avon Park, 311 U.S. 138. See R. 160.

Subsequent to the filing of the memorandum by petitioners Main and Wheeler, the Post Office Department began an investigation into the bond issue in Lee County, but because of the running of the statute of limitations, then turned its attention to a parallel investigation by the Securities and Exchange Commission relating to the refundings in other and distant counties and cities in Florida, about which Main and Wheeler had made no suggestions (R. 1310, 1333, 1387, 1403). These other refundings formed the basis for the indictments against respondents in Kansas which constitute the groundwork for their claim (R. 52-53, 151, 153). The sufficiency of the indictments was sustained by the Court of Appeals for the Tenth Circuit. United States v. Crummer, 151 F.2d 958 (10th Cir. 1945), cert. denied 327 U.S. 785. The indictments were later dismissed on the motion of the Department of Justice (R. 56-57).

evidence, consisting in large part of written statements made by the respondents or on their behalf before December 19, 1946, three years prior to the filing of their complaint. These statements and respondents' amended complaint established that before that date the respondents had already claimed that "the duPont interests" were engaged in activities designed to impede and injure respondents' business, and that respondents were unaware only of the identity of the persons who had filed the information with the Post Office Department.[2]

The issue of fraudulent concealment was tried to a jury which reported that it was unable to agree (R. 3117-20). The District Court thereupon directed a verdict for the petitioners pursuant to a motion for a directed verdict at the close of all the evidence previously made by petitioners and upon which the court had reserved ruling (R. 2905, 3120). In its opinion the District Court held that the evidence disclosed that the respondents were fully aware more than three years before instituting their suit of all of the alleged overt acts upon which they relied save only for the filing of the memorandum by Main and Wheeler with the Post Office Department. As to that act the District Court held that the filing of the memorandum "constituted no act of conspiracy" and that the failure of Main and Wheeler to disclose that they had filed the memorandum "did not constitute an act of fraudulent concealment" (App., p. 5a). The District Court further stated (App., p. 6a):

> "It appears from this record that plaintiffs rest their entire case of fraudulent concealment on the

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[2] These documents are set forth in part in note 10, at page 22, infra.

act of Main and Wheeler in filing the memorandum with the Post Office Department on May 21, 1941, and if the Court is in error as to the law on this issue, then fraudulent concealment as alleged has been fully established by the plaintiffs as to this one act."

On appeal the Court of Appeals again reversed. It held:

1. That the filing of the memorandum with the Post Office Department by the alleged conspirators Main and Wheeler was an act on which liability under the antitrust laws could be predicated and that the failure to disclose this act could, in itself and without more, constitute fraudulent concealment of respondents' cause of action (App., p. 20a); and

2. That respondents' lack of knowledge of the filing of the memorandum by Main and Wheeler could, as a matter of law, alone constitute sufficient proof that they did not have knowledge of their claim (App., p. 19a).

REASONS FOR GRANTING THE WRIT

I

AN IMPORTANT QUESTION IS RAISED BY THE HOLDING BELOW THAT THE SUBMISSION OF INFORMATION TO A FEDERAL LAW ENFORCEMENT AGENCY CAN CONSTITUTE A VIOLATION OF THE ANTITRUST LAWS FOR PURPOSES OF TOLLING THE STATUTE OF LIMITATIONS UNDER THE DOCTRINE OF FRAUDULENT CONCEALMENT

The District Court held that the submission of the memorandum to the Post Office Department by petitioners Wheeler and Main did not constitute an act

of conspiracy (App., p. 5a). The court referred to "the duty of every citizen" to report to the appropriate federal agency any violation of federal law of which he has knowledge. It stated "that the activities of Main and Wheeler in filing the memorandum . . . were not wrongful or illegal in any respect" (App., p. 5a). The District Court further held that those activities did not constitute an act of fraudulent concealment.

In reversing this holding, the Court of Appeals necessarily held that the submission of the memorandum could constitute a basis for imposing upon petitioners substantive liability under the antitrust laws. It must have reached this conclusion in order to decide that fraudulent concealment of the act would toll the statute of limitations. In its opinion, in fact, the Court of Appeals equated the substantive violation alleged with its fraudulent concealment, for it also held that no independent acts of concealment need be shown. See pages 15-17 below. And it is clear in any event that, for the doctrine of fraudulent concealment to apply, the act found to be concealed must be one which could, as a matter of law, constitute the basis for substantive liability.

The memorandum was assumed for purposes of the issue in dispute to have contained no false material. It merely directed the attention of a federal law enforcement agency to possible violations of federal statutes. It was confined to a straightforward, uncolored account of the facts, as is clear from the text of the memorandum set forth in full as an appendix to this petition (App., pp. 24a-29a). The holding that the filing of this memorandum could give rise to liability under the antitrust laws so that its concealment, if proved to be fraudulent, would toll the statute of limita-

tions raises a federal question of importance which has not been, but should be, decided by this Court.[3]

Beyond question, to attach such substantial potential liability to the giving of information to the government conflicts with long-established law enforcement policies. The information filed with the Post Office disclosed possible criminal use of the mails to defraud, a felony under 18 U.S.C. §1341. The disclosure of this material was accordingly not only required as an act

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[3] This question cannot be avoided by pointing to the fact that the amended complaint alleges that false charges were made in the Post Office memorandum. Those allegations, which were made for the first time in the amended complaint, would, of course, be accepted for purposes of testing the sufficiency of the allegations of the complaint. See 223 F.2d 238 (5th Cir. 1955). But here the question was whether an act which could form the basis for a valid claim under the antitrust laws had been fraudulently concealed. In testing that issue, it was assumed that no false charges were made in the memorandum (R. 522). Since the only act found by the Court of Appeals to have been fraudulently concealed was the submission of the memorandum, it follows that the question necessarily remains whether that act—the submission of a truthful memorandum to a federal enforcement agency—can give rise to a valid claim under the antitrust laws.

For similar reasons, this question is not avoided because the filing of the memorandum is assumed to have been done pursuant to the alleged conspiracy. The question presented by this petition is whether the consequences flowing from the filing of a truthful memorandum with a federal enforcement agency can give rise to liability under the antitrust laws whether or not done pursuant to some claimed conspiracy. As the discussion in the text shows, this is a substantial question; it is presented in a particularly dramatic way here because respondents' entire claim would be barred were it not for the claimed concealment of this one aspect of it.

of citizenship, but also strongly encouraged by law.[4] The confidential nature of such communications, which the court below apparently conceived of as a basis for imposing liability, is, on the contrary, legally protected in a variety of ways. The District Court here held that confidential treatment of the submission of the Post Office memorandum was required by Post Office regulations (R. 3695).[5] In the case of other agencies, the disclosure of such information is made the subject of criminal sanctions. See, for example, Section 10 of the Federal Trade Commission Act, 38 Stat. 723, 15 U.S.C. § 50. In addition, the courts have long protected the right and the duty of the citizen to communicate to the government any information which he has of the commission of a crime. See *In re Quarles*, 158 U.S. 532, 535-36. Such communications are to be protected "absolutely" and "without reference to the motive or intent of the informer". See *Vogel* v. *Gruaz*, 110 U.S. 311, 315.[6] This Court recently said of the

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[4] See 18 U.S.C. § 4. Compare also the various statutes rewarding persons giving information concerning certain crimes. See, e.g., Act of June 25, 1948, c. 645, 62 Stat. 820, as amended 48 U.S.C. § 3113; R.S. § 2124, 25 U.S.C. § 201; Act of July 3, 1920, c. 829, 46 Stat. 850, as amended 21 U.S.C. § 199; R.S. § 4499, Act of March 3, 1905, c. 1454, 33 Stat. 1025, 46 U.S.C. § 497.

[5] See R. 1274-76. The respondents made the communication to the chief postal inspector in Washington, D.C. (R. 3137). The submission of such information is provided for in the Postal Regulations (39 CFR § 5.2) and the same regulations provide that the reports of postal inspectors are privileged and may not be disclosed by employees of the Post Office Department without authorization (39 CFR § 4.3).

[6] In *Vogel* v. *Gruaz*, *supra*, this Court cited with approval *Worthington* v. *Scribner*, 109 Mass. 487, 12 Am. Rep. 736 (1872). In that case the Supreme Judicial Court of Massachusetts held

privilege to withhold the identity of persons furnishing information of violations of law (*Roviaro* v. *United States*, 353 U.S. 53, 59):

> "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation."

See also *Scher* v. *United States*, 305 U.S. 251, 254; *Wilson* v. *United States*, 59 F.2d 390, 392 (3d Cir. 1932).

A federal question of importance is therefore presented by the holding of the court below that the failure

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that in a suit for falsely and maliciously representing to the United States Treasury that the plaintiff was intending to defraud the revenue, the defendant should not be required to answer interrogatories with respect to the representations he had made to the Treasury Department. Mr. Justice Gray, then a member of the Massachusetts court, said (109 Mass. at 488, 12 Am. Rep. at 737-38):

> "It is the duty of every citizen to communicate to his Government any information which he has of the commission of an offense against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known to the absolute discretion of the Government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the Government."

to disclose the submission of information to a law enforcement agency can constitute in itself an act of fraudulent concealment. See pages 19-20 below. An important substantive question under the antitrust laws is also presented by the related holding that the same act constitutes the basis for liability under those laws so that its fraudulent concealment tolls the applicable statute of limitations.

A substantial and increasing number of cases under the antitrust laws have raised in a variety of forms the question of the extent to which liability may be based upon the consequences of government action instigated or encouraged by the defendants against the plaintiffs before federal regulatory agencies or other government bodies. See, for example, *S.S.W., Inc.* v. *Air Transport Ass'n of America*, 191 F.2d 658, 660 (D.C. Cir. 1951); *Okefenokee Rural Electric Corp.* v. *Florida Power & Light Co.*, 214 F.2d 413 (5th Cir. 1954); *Slick Airways* v. *American Airlines*, 107 F.Supp. 199, 213-214 (D. N.J. 1951), *appeal dismissed* 204 F.2d 230 (3d Cir. 1953), *cert. denied* 346 U.S. 806; *United States* v. *Association of American Railroads*, 4 F.R.D. 510, 527 (D. Neb. 1945); *Noerr Motor Freight* v. *Eastern Railroad Pres. Conference*, 113 F.Supp. 737, 742 (E.D. Pa. 1953) and 155 F.Supp. 768 (E.D. Pa. 1957); *United States* v. *Morgan*, 118 F.Supp. 621, 822 (S.D. N.Y. 1953); *Riss & Co.* v. *Ass'n of Western Railways*, 159 F.Supp. 288, 289 (D. D.C. 1958); *Boston & Maine R.R.* v. *United States*, 162 F.Supp. 289, 300 (D. Mass. 1958).

These cases all make potential defendants of the members of any group which seeks government assistance for itself to the possible damage of others. The acts claimed in these cases to provide the basis for liability range from support of particular legislation

to intervention before administrative agencies, and in some instances include the submission of information to law enforcement agencies with respect to possible violations of law. The decision below raises the same fundamental questions presented by these cases and does so in an aggravated form because it imposes potential liability for an indefinite period of time upon the members of any group which directs the attention of a law enforcement agency to possible violations of law by others. If the decision is permitted to stand without review by this Court, its inevitable effect will be to discourage the submission of information to enforcement agencies, including necessarily even those—such as the Department of Justice and the Federal Trade Commission—which are themselves charged with enforcement of the antitrust laws.

The court below erred in holding that the act of supplying information to a government agency concerning possible violations of a federal statute can serve as a predicate for liability under the antitrust laws even if the act is assumed to have been performed pursuant to a conspiracy. The antitrust laws are directed at private combinations and conspiracies in restraint of trade and are designed to protect the public against the consequences that follow from these private activities. *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469. The laws were not intended to regulate the relations between citizens and governmental agencies and cannot apply to consequences which are the result of governmental action. *Parker* v. *Brown*, 317 U.S. 341, 352; *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 358; see also *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 288. To extend those laws, as the court below did, into the area of governmental activity would impose upon the relations between the government and its citizens standards which were intended for other

purposes, and which are foreign and inimical to the rights of citizens to petition their government, to exercise free access to the courts, to appear before administrative agencies, and to submit information to law enforcement officials. The serious nature of the disruption of orderly government which can ensue from such an extension of the antitrust laws is evidenced in the present case. Here the court has held that the statute of limitations can be tolled and liability under the antitrust laws may attach merely by reason of the submission of information to a department of the government concerning possible violation of federal criminal law—an act which clearly falls within the responsibility of all citizens.

II

AN IMPORTANT QUESTION IS RAISED BY THE HOLDING BELOW THAT FAILURE TO DISCLOSE THE FILING OF THE MEMORANDUM BY PETITIONERS MAIN AND WHEELER WITH THE POST OFFICE DEPARTMENT COULD, WITHOUT PROOF OF FRAUD OR CONTRIVANCE, CONSTITUTE FRAUDULENT CONCEALMENT

The court below properly recognized that concealment "only by silence" is not enough to toll the statute of limitations and that the doctrine of fraudulent concealment requires that the defendant "be guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry" (App., p. 20a). But the court refused to apply this principle, holding instead that the mere failure to disclose the submission of the memorandum by petitioners Main and Wheeler to the Post Office Department could in itself constitute fraudulent concealment and that no proof of "trick or contrivance" was required.

The court justified its holding on the ground that "the fraudulent use by the appellees of the Govern-

mental bodies whose investigations are by law largely kept secret necessarily resulted in the degree of concealment, which, if successful, would toll the running of the statute" (App., p. 20a).

This conclusion did not, and could not, rest on any finding that the memorandum submitted to the Post Office Department was "fraudulent" because it was false or without probable cause; on the trial of the issue of fraudulent concealment the respondents took the position that the truth or falsity of the memorandum was immaterial and it necessarily follows that for the purposes of that issue the truth of the memorandum had to be assumed (R. 522, 573-575, 582-583, 2921). Nor did the court's conclusion rest on any finding that over and beyond the respondents' failure to disclose the submission of the memorandum to the Post Office Department they had engaged in some stratagem or trick to conceal the fact of its submission. The court did not rely upon any act of that kind and its opinion affirmatively shows that its reasoning did not depend upon any finding that such an act had been committed.

The court's reasoning rested rather upon other and different considerations. The first of these considerations was that the court believed an element of fraud was supplied by the fact that for the purpose of determining the issue of fraudulent concealment, the submission of the memorandum to the Post Office Department was assumed to be an act committed pursuant to the conspiracy alleged in the complaint.[7] The second

[7] The Court of Appeals said that since on the issue of fraudulent concealment it assumed the existence of the conspiracy, it would treat the case as if the respondents' charge that the petitioners did "secretly move under the guise and protection of the public interest and through the public authorities" had been proved (App., p. 20a).

consideration on which the court relied was that the memorandum was submitted to a government agency which as a matter of policy and practice maintained secrecy with respect to the identity of informants and the substance of the information they communicated.[8]

It was error for the court below to hold that these two considerations, taken either separately or together, establish fraudulent concealment and this error raises important questions of law which should be settled by this Court.

It is well settled that a private cause of action to recover damages for injuries claimed to have been caused by a conspiracy in violation of the antitrust laws is not a cause of action for fraud or breach of trust and that consequently the nature of the cause of action in itself provides no basis for dispensing with the requirement that affirmative acts of fraudulent concealment must be established if the statute is to be tolled. *Foster & Kleiser Co.* v. *Special Site Sign Co.*, 85 F.2d 742 (9th Cir. 1936), *cert. denied*, 299 U.S. 613; *Burnham Chemical Co.* v. *Borax Consolidated Limited*, 170 F.2d 569 (9th Cir. 1948), *cert. denied*, 336 U.S. 924; *State of Oklahoma* v. *American Book Co.*, 144 F.2d 585 (10th Cir. 1944); *Strout* v. *United Shoe Machinery Co.*, 208 Fed. 646 (D. Mass. 1913).

The reasoning of the Court of Appeals is in direct conflict with these decisions. An essential element of that reasoning equates a presumed act of conspiracy in violation of the antitrust laws with an act of fraud and then interprets the failure to disclose the act of conspiracy as a fraudulent concealment which suspends

[8] The court's reliance upon this ground is plainly indicated by its reference to the fact that the investigations of government agencies "are by law largely kept secret" (App., p. 20a).

the running of the statute of limitations against the conspiracy itself. This view, if accepted, would severely limit the effectiveness of the statute of limitations as a bar to stale causes of action in the civil antitrust field. Such a rule of law would mean that in any civil antitrust action the statute of limitations could be tolled merely by proof that the alleged conspirators had failed to disclose a single overt act which the injured party, in the exercise of reasonable diligence, had not discovered within the limitation period. In view of the long periods of time and the number and variety of the overt acts usually covered by the allegations of a conspiracy in an antitrust case, the practical consequence of such a doctrine would be to deprive the limitation statute of most of its effect.

Since the reasoning of the Court of Appeals turns upon the view to be taken of the substantive character of a private cause of action under the antitrust laws its effects could not be confined to the instant case but would have general application in the field of private antitrust litigation. The doctrine enunciated below would affect the interpretation and application of the uniform statute of limitations for private suits under the antitrust laws which was enacted by Congress in 1955 (15 U.S.C. § 15(b)).

The holding of the court below is not consistent with the trend of decisions of this Court which have recognized the importance of confining the vague and illusive doctrine of conspiracy within reasonable limits. *Krulewitch* v. *United States*, 336 U.S. 440; *Lutwak* v. *United States*, 344 U.S. 604. In this connection it is significant that this Court has recently refused to permit the charge of concealment to be used as a method of indefinitely prolonging the period of time within which a criminal prosecution may be brought under the gen-

eral conspiracy statute (18 U.S.C. § 371). See *Grunewald v. United States*, 353 U.S. 391.[9] Considerations analogous to those that moved the Court in that case require the rejection of the novel and erroneous doctrine applied by the court below.

It follows from what has been said above that the act of submitting information to a government agency concerning possible violations of federal criminal law cannot be regarded as fraudulent merely because the act is assumed to be committed pursuant to a conspiracy to violate the antitrust laws. But the holding of the court below stands in no better posture if we look to the nature of the act itself rather than to the nature of the cause of action alleged in the complaint. Indeed, by holding that the nature of the act was such as in itself to supply an element of fraud, the court compounded its error and enhanced the importance of the questions raised by its decision. Even if it is assumed *arguendo* that there may be circumstances in which liability under the antitrust laws can follow from such an act, the act itself is not fraudulent in character; failure to disclose the act is not a "trick or contrivance" and cannot in any circumstances establish fraudulent concealment.

In reaching a contrary conclusion the court below relied primarily upon the fact that investigations by

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[9] The Court said (353 U.S. at 402, 405):

"Sanctioning the Government's theory would for all practical purposes wipe out the statute of limitations in conspiracy cases. . . .

* * * *

"We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret. . . ."

governmental agencies are "largely kept secret" (App., p. 20a). By this reasoning the court drew an inference of fraud from the existence of a governmental practice which is uniformly followed by law enforcement agencies and which is supported by the strongest considerations of public interest. The court thereby committed an error which creates a grave conflict with the federal policies and statutes which encourage citizens to submit to governmental agencies information relating to possible violations of law. There is no basis in logic or in authority for the view that an imputation of fraud can arise from the fact that the government protects the confidential character of such communications. And there is likewise no support for the view that an imputation of fraud can arise by reason of the fact that a citizen does not publicly disclose that he has made such a communication. In fact, the same considerations that entitle the government to protect the confidential character of the communication repel the suggestion that a citizen is guilty of fraudulent concealment when he fails to disclose that he has made one.

III

THE HOLDING BELOW THAT RESPONDENTS LACKED KNOWLEDGE OF THEIR CLAIM BECAUSE THEY WERE UNAWARE OF THE IDENTITY OF THE PERSONS MAKING REPRESENTATIONS TO THE POST OFFICE DEPARTMENT IS IN CONFLICT WITH A DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT

The court below also erred in holding that because the respondents did not know who had filed the memorandum with the Post Office Department they were unaware of their claim and were entitled to invoke the doctrine of fraudulent concealment. In reaching its conclusion on this point, the Court of Appeals departed from the accepted doctrine that the statute cannot be tolled merely by proof that the plaintiffs lacked knowledge of some part of their claim, or of the identity of the persons doing an act claimed to constitute part of the conspiracy.

Facts which were undisputed and were accepted by both the District Court and the Court of Appeals make it clear that more than three years before the filing of the complaint the respondents had asserted in writing that they were the subjects of a conspiracy on the part of at least some of the petitioners here, and that petitioners were directly or indirectly responsible for substantially all of the transactions which respondents now contend constitute the body of the alleged conspiracy. Respondents' amended complaint discloses that respondents knew for a considerable time prior to December 1946 that someone had submitted information to the Post Office Department concerning respondents' activities in the refunding of municipal bonds in Florida (R. 87-89). At most, all that was unknown to

the respondents was the identity of the persons who had submitted information to the Post Office Department, and the asserted relationship between the persons submitting the memorandum and the other alleged conspirators.

This knowledge by respondents of their claim is established by the amended complaint and by documents which were carefully prepared for, or with the approval of, the respondents and which they do not attempt to gainsay or to deny. One of these documents was filed with respondents' approval on September 30, 1946, as an answer in a state court proceeding against respondents in Florida (R. 3446). The other was presented to the Department of Justice on February 25, 1946, on behalf of respondents in connection with hearings held within the Department on the indictments which arose from the investigation of their business activities by the Post Office Department and the Securities and Exchange Commission (R. 56-57, 156-57, 3198). Although each of these documents considered separately might be said to indicate certain gaps in the respondents' knowledge, the two documents taken together with the amended complaint make it clear beyond any doubt that the respondents were fully aware of their cause of action.[10]

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[10] Extracts from these documents are quoted at length in the opinion of the court below (App., pp. 14a-16a).

The answer in the state court proceeding filed by the defendant-intervenor James Wynn, with the approval of respondents, stated that the state court action "was instituted in bad faith and with improper motives, and has been so prosecuted to this date as part of a well planned and determined conspiracy and scheme to defeat the defendant, R. E. Crummer, and his company's municipal refunding operations in Florida" (R. 3449). The conspiracy was alleged to have taken the form "of a series of attacks made in the

The court below nevertheless held that the statute could be tolled upon proof that plaintiffs lacked knowledge of the identity of the persons submitting the memorandum to the Post Office Department and that plaintiffs did not know that those persons were acting in concert with other alleged co-conspirators. By so holding the court below applied a rule of law in conflict with that applied by the Court of Appeals for the Ninth Circuit in *Suckow Borax Mines Consolidated* v. *Borax Consolidated Ltd.*, 185 F.2d 196 (9th Cir. 1949), *cert. denied*, 340 U.S. 943. In that case the court held,

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Courts, before the United States Securities and Exchange Commission, the Post Office Department, the Florida Securities Commission, the Florida State Board of Administration, and elsewhere . . ." (R. 3449). The alleged participation in the conspiracy of the United States Postal Inspector responsible for the investigation of respondents' bond refunding activities was fully detailed (R. 3451-54).

The document submitted to the Department of Justice by counsel for respondents indicates at numerous points respondents' knowledge that their business activities were strongly opposed by "the duPont interests" (R. 3207-10, 3215). The memorandum further states (R. 3219): "The duPont interests apparently concluded they had to wage war if their selfish plans, dreams, etc. were to reach fruition on Crummer. . . ." The relationship between petitioners and the Post Office Department investigation of respondents' business activities was described in the memorandum as follows (R. 3220-21):

> "The duPont interests failed in their fights in the Florida legislature for they were fighting not only Crummer but the people of the state; they failed in their fight against the enactment of the amendment to the Federal Municipal Bankruptcy Act, because of the overwhelming support urging its enactment; and they failed in their fights in the Courts because the merits were against them.
>
> "However, when the agents of the SEC and Post Office Department moved in and took over the front line of attack

contrary to the holding below, that the statute was not tolled merely by proof that the plaintiffs lacked knowledge of some of the transactions and incidents which were alleged to have taken place as part of the conspiracy. There, as here, a claim for treble damages was based upon a general conspiracy to drive the plaintiffs out of business, and there, as here, the plaintiffs claimed lack of knowledge of the conspiracy because they did not know some of the conspirators, and did not know some of the acts done pursuant to the conspiracy.[11] The court stated in part (185 F.2d at 206):

> "Appellees' [defendants'] affidavits showed beyond dispute that for many years . . . Suckow and his attorneys had repeatedly accused certain of appellees, both in and out of court, of violating the

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upon Crummer the course of the battle changed. The potent forces of the Federal Government were too much for Crummer. He was compelled to retreat. . . . Immediately the duPont interests assumed the position of prominence to such an extent that there now exists a duPont public credit monopoly in Florida. . . .

"I realize that the Department of Justice is not interested in the success or failure of competitors in any field of endeavor, but I am certain that it is extremely interested in determining whether or not its authority is being used by others as a vehicle to persecute one competitor at the behest of another, . . ."

This memorandum, and the contemporaneous statements of respondents' counsel, led Department of Justice investigators to conclude that respondents "feel confident that the SEC investigation which had lead [sic] to the two indictments heretofore mentioned had been the brain-child of the duPont-Ball Interests. . . . [and] that the duPont-Ball Interests are out to smash Crummer, and strongly indicates that the duPont-Ball Interests are behind the SEC and Post Office Department investigation of Crummer" (R. 3225-26).

[11] The court below was in error in stating that the plaintiffs in the *Suckow* case knew the identity of all of the co-conspirators.

> antitrust laws for the specific purpose of damaging Suckow and driving him out of business in order to effect and perpetuate these appellees' worldwide monopoly of the borax industry. Appellants' [plaintiffs'] opposing affidavits did not attempt to refute these statements but merely explained that Suckow had no knowledge of the particular 'General Conspiracy,' of the year in which it was formed, or of the participation by all of the conspirators, and had no 'proof' of the existence of any illegal conspiracy.
>
> "To what extent Suckow's knowledge of the particular 'General Conspiracy' was material will be considered below. In any event we think it abundantly clear that the record shows that by 1934 Suckow knew he was being grievously damaged by acts of appellees, or some of them, and that at that time he believed, and charged, that these acts, which damaged him or his company, also violated the antitrust laws. A mere general allegation in the complaint to the contrary would not be sufficient to create a 'genuine' issue of fact."

The decision below cannot be reconciled with the decision in the *Suckow* case by suggesting, as the Court of Appeals did, that the submission of the memorandum to the Post Office Department changed the essential nature of the conspiracy (App., p. 18a). The respondents allege a "single but concealed continuing conspiracy" which on their own showing antedated the submission of the memorandum and included a variety of other acts and transactions said to be directed to the same unlawful purpose (R. 79-80).[12] There is no rational basis for segmenting or compartmentalizing the

[12] The complaint alleged "a coordinated attack" consisting of "a single series of contemplated acts, the cumulative effect of which

alleged single conspiracy so that any one of the several transactions alleged to constitute its body can, for the purpose of the statute of limitations, be regarded as constituting a separate cause of action. Any such distinction between different parts of a single conspiracy is wholly artificial and cannot obscure the fact that in substance the decision below necessarily stands for the proposition of law that ignorance of the identity of the persons participating in a single one of many acts said to be a part of a conspiracy is enough to toll the statute of limitations even though there is undisputed knowledge of the conspiracy itself and of its alleged unlawful purpose. Under such a rule of law the life of potential claims based upon alleged conspiracy would be indefinitely prolonged and the statute of limitations would, for practical purposes, cease to operate in conspiracy cases.

CONCLUSION

For the foregoing reasons the petitioners pray that this petition for a writ of certiorari be granted.

Respectfully submitted,

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was calculated and intended to destroy both plaintiffs" (R. 79). It characterized this alleged attack as including "a single series of well timed, mutually complementary attacks calculated to arrest and keep arrested the plaintiffs' business operations" (R. 79). These attacks were alleged to give rise to "a single cause of action arising from the defendants' preconceived single course of continuing conduct from which the damages are indivisible and incapable of apportionment with respect to any of the particular injurious acts complained of" (R. 79-80).

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APPENDIX

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APPENDIX A

MEMORANDUM DECISION OF THE DISTRICT COURT STATING GROUNDS UPON WHICH THE COURT DIRECTED A VERDICT

(Entered February 13, 1957)

This action was instituted by plaintiffs under the Anti-Trust Laws of the United States. Plaintiffs charge that various persons named as defendants, together with other persons not named as defendants, conspired with each other in violation of the Anti-Trust Laws to injure, damage and destroy plaintiffs in their business.

This suit was instituted on December 19, 1949. The complaint charges that the conspiracy between defendants to put the plaintiffs out of business was formed early in 1941. Plaintiffs charge the defendants with the commission of approximately forty overt acts of conspiracy between that date and June 30, 1946.

The case came on for hearing before the Court on a motion to dismiss filed by all the defendants save three on the ground that the suit was barred by the Statute of Limitations. The Court, after full hearing on said motions to dismiss, dismissed this case on the ground that same was barred by the Statute of Limitations. The Court held the three year statute applicable.

The three exceptions referred to above were Post Office Inspector Edward J. Mansfield, Walter Gaul and Cummer Cypress Lumber Company. The Court granted the motions of these defendants to dismiss on the ground that they had been improperly joined as co-conspirators and party-defendants in the case.

(Crummer Company, et al., v. duPont, et al., 117 F. Supp. 870.)

Promptly upon the Court's opinion and order coming down dismissing this case on the ground it was barred by the Statute of Limitations, plaintiffs applied to the Court for authority to amend the complaint, charging more specifically acts of fraudulent concealment of their activities by the defendants, and the Court gave to plaintiffs the right to file such amendment. Upon further hearing upon the amended complaint, the Court adhered to its former ruling and dismissed the action on the ground it was barred by the Statute of Limitations.

On appeal the Court of Appeals affirmed this Court in respect of every order it had entered in the case, save and except on the question of the fraudulent concealment of the alleged overt acts charged by plaintiffs. The Court held that plaintiffs were entitled to a jury trial on this specific issue. (The Crummer Company, et al., v. duPont, et al., 223 F.2d 238.)

When the case came back to this Court, an order was entered setting this case for trial before a jury on the single issue of fraudulent concealment and the case finally came on for trial upon this issue.

As heretofore stated, the complaint charges defendants with the commission of approximately forty overt acts in the execution of the alleged illegal conspiracy. The complaint named public authorities of the State and Federal Governments as the only visible activity behind which plaintiffs claim the alleged overt acts were committed. These activities of public authorities behind which the defendants are alleged to have operated were grouped and classified into five groups by this Court in its opinion in this case (117 F. Supp. 874) and need not be repeated here.

When the Court began holding pre-trial conferences to define the issues that would be submitted to the jury and to require counsel for the respective parties to designate those parts of the voluminous discovery depositions and exhibits they desired to use in the trial of the single issue of fraudulent concealment, plaintiffs announced the abandonment of all alleged overt acts except the fifth classification made by this Court as follows:

"The alleged investigation authorized by the Attorney General of the United States which led to the return of two indictments against R. E. Crummer and Company and others in the District Court of the United States, District of Kansas, Second Division, in August, 1944."

This case was thereupon readied for trial upon this limited issue of alleged fraudulent concealment and counsel for the respective parties cooperated admirably in designating such parts of the voluminous discovery depositions and exhibits each party desired to use at the trial; in fact, they cooperated in this respect so completely that no counsel found fault with the designations made by any opposing counsel.

In connection with the limited designation of the issues by plaintiffs, it should be kept in mind that plaintiffs named as co-conspirators Post Office Inspector Edward J. Mans-

field, who was named as a party-defendant in the complaint, and Thomas B. Hart, Robert T. Wright, George Ruetell, F. Joseph Butler and Alexander J. Brown, Jr., employees of the Securities and Exchange Commission, were not made party-defendants because they resided beyond the jurisdiction of this Court. As stated above, this Court by appropriate order dismissed Post Office Inspector Mansfield as a party-defendant and the Court of Appeals affirmed this Court in that action. So this case went to trial before the jury on the single issue of fraudulent concealment of the alleged conspiratorial activities between the named defendants, or some of them, and those Federal Government employees conducting the investigations, which investigations resulted in the return of the two indictments against the plaintiffs and others in Kansas.

The evidence in this case discloses no conspiratorial overt act by any of the defendants (with one noted exception to be referred to later) with any Government employee. All it discloses is that some of the Government employees during their investigations contacted a few of the defendants and solicited certain specific information from them. There was nothing improper or unusual brought out in the evidence in connection with these interviews being carried on by the Government employees. Moreover, these contacts were generally known by plaintiffs long before June 30, 1946.

The one noted exception is that of Walter P. Fuller. The evidence in the case discloses that the House of Representatives of Florida in the 1941 Session passed a resolution authorizing the appointment of a Committee to investigate into the activities of bond houses dealing in municipal bonds in the State of Florida. This Committee was reactivated early in 1942 by the Honorable Spessard Holland, Governor, and Walter P. Fuller was appointed as the investigator for this Committee. The Committee was to complete its investigation in time to make a report to the 1943 Session of the Legislature and to the Governor. The evidence shows that Fuller was an extremely active Investigator for his Committee, apparently limiting his activities to the Crummer Companies and he prepared for his Committee and the Committee submitted to the Governor and to the Legislature a report touching upon his investigation of these companies. R. E. Crummer testified extensively as to his relationship with Fuller dating back

many years and as to the animosity Fuller held against him and his companies. The activities of Fuller as an Investigator for the Governor and the House Committee became fully known to plaintiffs when the Committee filed its report with the Governor and the Legislature early in 1943.

The investigations of the Post Office Department and the Securities and Exchange Commission were just getting under way, according to the testimony in the case, when Fuller was actively engaged in his investigation for the Legislative Committee and for the Governor of Florida. Fuller learned of this investigation through contacts he made with others during the course of his investigation for the Legislative Committee and he sought an interview with Post Office Inspector Mansfield, advised Mansfield of his activities for the Legislative Committee and the Governor and offered to supply Mansfield with any information in his possession that Mansfield might desire. There is no evidence in the case that any of the other named defendants had anything whatever to do with Fuller's activities in behalf of the Governor and his own Committee, or in the supplying of information to the Federal employees.

Fuller was subpoenaed to appear before the Grand Jury in Kansas and gave damaging testimony against plaintiffs, but there is no testimony in the record in this case that supports the allegations of the complaint that Fuller was a part of the alleged duPont-Wheeler-Pierce conspiracy. And on this record they cannot be held responsible for any of Fuller's activities as an Investigator for the State of Florida or in the contacts he solicited from and had with the Federal employees during the course of their investigations, which led to the return of the two indictments against plaintiffs in Kansas.

The great preponderance of the evidence discloses that plaintiffs were fully aware of the activities of Fuller and of the Federal Investigators, including their contacts with the named defendants, all the while the investigations were going on and this knowledge and information was most effectively used by the plaintiffs in their arguments to Assistant Attorney General T. Lamar Caudle and the panel of attorneys in his office that he created at plaintiffs' request to pass upon the question as to whether or not the indictments against plaintiffs should be dismissed. The

record in this case is full of information supplied Assistant Attorney General Caudle by plaintiffs on this question. The Statute of Limitations, therefore, was effectively in operation on all these matters save one from the date the moratorium act expired on June 30, 1946.

The one exception to the statement just made above relates to one act of defendants, Roger L. Main and Howard S. Wheeler. The evidence in this case shows that on May 21, 1941, these defendants filed with the Post Office Department in Washington, D. C., a memorandum with certain papers attached as exhibits, charging irregularities in connection with the handling of certain bonds of Lee County, Florida, for which R. E. Crummer and Company was fiscal agent at the time, and that thereafter on May 31, 1941, defendant, Roger L. Main, wrote a letter to the Post Office Department at the request of the Department formalizing these charges. Both Main and Wheeler testified that neither disclosed to anyone save probably Wheeler's business associate, Loomis C. Leedy, that this memorandum had been filed with the Post Office Department by them until after the Post Office Department itself made the disclosure.

It is alleged by plaintiffs and admitted by defendants, and the evidence shows, that plaintiffs had no knowledge of the above mentioned activities of the defendants, Main and Wheeler, until December 27, 1946. This date is within three years of the bringing of this suit. The Court held in this case, and so instructed the jury, that the filing of this memorandum by defendants, Main and Wheeler, with the Post Office Department constituted no act of conspiracy and that the failure of these defendants to disclose that they had filed said memorandum to anyone prior to December 27, 1946, did not constitute an act of fraudulent concealment. The Court held that it is the duty of every citizen to report to the appropriate department of the United States Government any violation of the Federal laws of which he has any knowledge, and that the activities of Main and Wheeler in filing the memorandum above mentioned were not wrongful or illegal in any respect. The Court further held and charged the jury that it was against Postal Regulations for the Post Office Department to make any disclosure with reference to this memorandum until the Post Office Department investigation had been terminated and the two indictments brought against plaintiffs had been dismissed. The evidence shows that the disclosure was in fact made to

a United States Senate Subcommittee after the two indictments against plaintiffs had been dismissed. The Court, however, in this case went on to instruct the jury that the activities of Main and Wheeler in filing this memorandum with the Post Office Department may be considered by the jury in determining whether the defendants are guilty of other overt acts which they concealed from plaintiffs.

It appears from this record that plaintiffs rest their entire case of fraudulent concealment on the act of Main and Wheeler in filing the memorandum with the Post Office Department on May 21, 1941, and if the Court is in error as to the law on this issue, then fraudulent concealment as alleged has been fully established by the plaintiffs as to this one act.

Near the conclusion of the trial of this case, counsel for plaintiffs attempted to again inject into the case the issue as to whether the activities of Walter Gaul and the Cummer Cypress Lumber Company in joining in the suit with the Board of Administration in a Pasco County case was barred by the Statute of Limitations. This Court and the Court of Appeals held in the two opinions referred to above that the alleged overt acts charged by plaintiffs against Gaul and the Cummer Cypress Lumber Company with reference to this litigation were not conspiratorial acts and the Court reaffirmed those holdings in this case.

At the conclusion of all the testimony of plaintiffs, counsel for defendants filed and pressed a motion for a directed verdict, which the Court promptly denied. Then again at the conclusion of all the evidence in the case and after all the parties had rested, counsel for defendants renewed their motion for a directed verdict. The Court held this motion under advisement until after the case had been submitted to the jury. After almost a full day of deliberation divided into two parts, the jury reported to the Court that it was in irreconcilable disagreement and unable to reach a verdict. Upon the Court being so advised by the Foreman of the jury, the Court promptly directed a verdict for defendants and announced to the jury at the time its reasons for doing so. After the verdict had been returned by the jury at the Court's direction, counsel for plaintiffs excepted thereto and insisted that the Court was without authority to direct a verdict in the case inasmuch as it held a mandate from the Court of Appeals to submit the issue of fraudulent concealment to a jury and this mandate

of the Court of Appeals deprived this Court of its authority to direct a verdict in the case. The Court held the point was not well taken and affirms that holding here. This Court certainly did not lose its power to enter a judgment notwithstanding the verdict in this case had a verdict been returned for plaintiffs by the jury and assuming such power to exist in the Court, the Court certainly possessed authority to proceed in the matter in the simple way of directing the jury to return a verdict in the case.

The evidence in the case is totally insufficient to sustain plaintiffs' allegations of fraudulent concealment and the verdict directed by the Court brings this long, protracted litigation to an appropriate end. A final judgment dismissing this case in conformity with this Memorandum-Decision will be entered herein.

Dated this 13 day of February, 1957.

DOZIER A. DEVANE,
District Judge.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16609

THE CRUMMER COMPANY AND R. E. CRUMMER & COMPANY, APPELLANTS,

versus

JESSIE BALL DUPONT, ETC., ET AL., APPELLEES

Appeal from the United States District Court for the Northern District of Florida

May 8, 1958

Before HUTCHESON, Chief Judge and TUTTLE and BROWN, Circuit Judges

TUTTLE, Circuit Judge: This case is here on appeal for the second time. This appeal attacks the judgment of the trial court based on a directed verdict finding that the statute of limitations had not been tolled by reason of any fraudulent concealment on the part of the defendants in a treble damage anti-trust suit.

The question presented is whether there was any evidence from which the jury could have found fraudulent concealment of the cause of action, for if there was then the trial court could not properly take that issue from the jury.

The nature of the case and the groupings of the parties are well set out in the published opinion of the trial court when the complaint was originally dismissed for failure to allege facts on which a jury could find that the Florida three-year statute of limitations had been tolled, *Crummer Co.* v. *duPont*, 117 F. Supp. 870, and also in our opinion reversing that judgment, *Crummer Co.* v. *duPont*, 5 Cir. 223 F. 2d 238. We shall here attempt no more than a brief summary of the cause of action and the history of the case.

Brought by appellants, hereinafter sometimes called Crummer, once the most active dealers in Florida taxing

unit bonds and other securities and later allegedly successful proponents of refunding plans for the alleviation of the widespread financial distress of both the Florida taxing units and the holders of their bonds, the complaint charged the defendants with violation of the antitrust laws of the United States to the appellants' substantial damage. The following statement of the nature of the case is taken from our previous opinion:

> "Recurring then to the formation of the Ball duPont plan to capture and 'virtually control the State of Florida by a general infiltration area-wise of the control of the financial, commercial, transportation and manufacturing institutions and resources of Florida', the complaint alleges: that the initial cleavage between R. E. Crummer and Edward Ball occurred in the year 1929; that from this point forward up to and including the time of the filing of the complaint, the defendant Edward Ball has continuously criticized the undertakings in Florida and all companies bearing the Crummer name; that from 1933 and continuing without any serious consequences until 1941, the Ball duPont defendants and the Leedy-Pierce defendants became active participants in the bond market and competitors of plaintiffs; and that sometime in 1941, at least before May, 1941, the exact date not being given because of the secrecy and concealment attending its formation and execution, the illegal combination, conspiracy, etc. complained of herein began. As detailed, these activities consisted of: acts of the Legislature of Florida calling for an investigation of the activities of all bonding companies in Florida; the issuance of executive orders and the appointment of committees by the Governor of Florida; investigations by the Post Office Department and the Securities and Exchange Commission; and the returning of two indictments against R. E. Crummer & Company and others, on August 3, 1944, in the United States District Court for the District of Kansas.
>
> "Alleging in effect that the bringing of these indictments and the unfavorable publicity attending their pendency until they were dismissed on June 10, 1946, 'brought about the destruction of the plaintiffs' business and property, as was intended by defendants', the complaint went on, in paragraph 38(t) to say:

"'The said criminal indictments remained upon the docket of the United States District Court until June 10, 1946. During the pendency thereof, plaintiffs' business was paralyzed and eventually destroyed and plaintiffs were thereby effectively eliminated and suppressed as competitors in the municipal investment field in the United States. Enormous expenses for the preparation of the defense to the said criminal indictments were incurred. Plaintiffs and their officers and employees were substantially driven from the municipal investment field of the United States.'

"Alleging many overt acts, including the criminal indictments in Kansas, the two civil suits in Florida, the Lathrop suit in the Federal Court, and the Pasco suit in the State Court ostensibly instigated and carried on by public authorities but, as complainants alleged, in fact instigated by, and carried on as a result of the conspiracy of, the defendants in violation of the anti-trust laws, to recover for which this suit is brought, the complaint further alleged that, though the confederation, combination and conspiracy, and the unlawful acts and things occasioned and done by defendants in furtherance of their predetermined purposes and objectives, began early in the year 1941, the existence of said illegal conspiracy, the name and identities of the persons participating in it, the purpose and objectives to be accomplished thereby, and the scheme by and through which it would be achieved, were not discovered by the plaintiffs until January, 1947."

In the earlier decision of this case we affirmed the ruling of the trial court that the Florida three-year statute of limitations applied. We found that this would cause the claim to be barred on June 30, 1949, nearly six months before it was filed on December 19, 1949, unless the running of the statute was tolled. Appellants contended that it was so tolled until December 27, 1947 [1946], by the fraudulent concealment of the facts by the appellees. As to that, the trial court, in its first decision, held that the amended complaint did not sufficiently allege fraudulent concealment. We reversed on this point, holding that the complaint did

sufficiently allege facts that if proved would toll the statute of limitations.[1]

When the matter came again before the trial court a pre-trial order directed that only the issue as to fraudulent concealment should be submitted to the jury. The court entered the following order:

> "Upon the trial of the single issue of fraudulent concealment in the above-styled cause, it will not be necessary for the plaintiffs to prove:
>
> "1. That a conspiracy to violate the Federal Anti-Trust laws existed among the defendants as alleged in the First Amended Complaint.

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[1] In this connection we said:

> "This brings us at last to the final point in the case, whether the district judge was right in dismissing the amended complaint for failure to sufficiently allege fraudulent concealment. Without setting out the allegations, because of their great length, we think it quite clear that plaintiffs' amended complaint does well state their claim, that by secretly moving under the guise and protection of the public interest and through the public authorities, the defendants fraudulently intended to and did conceal the scheme and their participation in it, and that the defendants' effort to meet this pleading by invoking judicial notice of matters which they call to our attention in their briefs, will not at all do. It may well be that the facts are better pleaded than they can or will be proved. The matters to which appellees seek to call our attention may prove the Achilles heel in, and the death wound to, plaintiffs' case before the jury, but these are not matters which arose on the face of their pleading or in any other proper way below, and we may not consider them in passing on the ruling under review. Their claim of blissful ignorance may suffer also before the jury from their admissions in their pleadings that Ball's antipathy, indeed enmity, to them, was of long standing and had been long known to them, as it may with the jury open a breach in their defense of fraudulent concealment, but these and all other such matters are and must remain for the arbitrament of the jury and may not be adjudicated by the court." 223 F. 2d 238, 248.

"2. That damages were sustained by the plaintiffs as the result of the conspiracy."

The theory of the order was, of course, that there need be no prolonged trial on the merits unless appellants could prove they were not barred by the statute of limitations. The effect of the order was that the court set out to try this question: assuming there existed the conspiracy alleged in the complaint and that it had damaged appellants, did the plaintiffs have knowledge of the cause of action prior to December 19, 1946 (three years prior to the date suit was filed), and if they did not was their want of knowledge attributable to fraudulent concealment of the facts by appellees?

After a trial lasting four weeks, the case was submitted to the jury which deliberated for an hour and forty minutes one day, and for two hours and five minutes the next morning. Thereupon, the jury then being in disagreement, the court directed a verdict in favor of the defendants on the issue of fraudulent concealment. Such order is supportable, of course, only if there was no genuine issue of fact which the jury could have resolved in favor of the plaintiff.

Fraudulent concealment as a basis for tolling the statute of limitations comprehends two elements: successful concealment and fraudulent means. "If in fact the alleged efforts of defendants to conceal their activities adverse to appellants' interests were not successful, that is, if in spite of such efforts appellants did learn of the existence of such a conspiracy resulting in their damage more than three years before suit, then it would not be necessary to inquire into the motivations back of appellees' efforts to conceal. We first consider then whether appellants carried their burden of making a prima facie showing that they lacked knowledge of the conspiracy.[2]

In order to prove lack of knowledge of the conspiracy due to fraudulent concealment the appellants did undertake to prove many facts relating to the conspiracy itself. Favorable to this position, the jury could find from the evidence, documentary and oral, the following: Following 1929 there

[2] Since upon the trial of this one issue the existence of the conspiracy as charged is assumed, we shall hereafter refer to *the conspiracy* in that sense, although such reference in no way implies that there has been a finding that such a conspiracy did in fact exist.

was keen commercial rivalry between Crummer and the Ball interests; the financial fortunes of Ball were in some measure jeopardized by the refunding operations identified with Crummer; this led to an announced declaration by Ball to fight it out with Crummer on the taxing unit bond field in Florida; in 1941 Roger Main, an official of Ball, and Howard S. Wheeler, of Leedy, Wheeler & Co., brokers having a lucrative relationship with Ball, went to the office of the Chief Post Office Inspector in Washington and filed charges of mail fraud against Crummer;[3] this initiated an investigation by the Post Office Department and the Securities & Exchange Commission that ultimately resulted in mail fraud indictments in Kansas City, Missouri, in August 1944; in the meanwhile the Florida State Legislature set up an investigating committee which used defendant Walter P. Fuller as investigator; Fuller closely collaborated with Ball and Federal agents to the end that highly unfavorable reports were made in the committee's report; assistance was given by Fuller in the investigation resulting in the indictments; Ball wrote a letter on November 16, 1942, to the Florida Securities Commission requesting the cancellation of Crummer's license. That letter indicated knowledge of activities of Crummer uncovered by Fuller that Fuller later testified were secret; such activities were cited by Ball in his letter as grounds for revoking Crummer's license. The existence of this letter was not known to appellants until January 1947; on May 29, 1943, Ball wrote another letter to the Florida Securities Commission challenging Crummer's right to act as agent for the City of Inverness, as authorized by a special act of the legislature; the existence of this letter was also unknown until January 1947; this letter was shortly followed by a quo warranto proceeding brought by the state to prevent Crummer's acting; it was ultimately won by Crummer.

At about this same time Crummer applied for a license before the Securities Commission; he knew that Ball

[3] We depart from the chronological statement of fact here to state that the fact that Main and Wheeler actually made representations to the Post Office Department was not known by appellants until December 27, 1946, within the period of three years from the filing of the suit. This is agreed to by everybody. It is in effect claimed by appellants to be the main support of their claim of lack of knowledge.

duPont was opposing this application, but on making what amounted to prodigious efforts to find out if in fact Ball-duPont's opposition was, in any way, responsible for the denial of his license and the bringing of the quo warranto suit he was assured by the officials that this was not so; application for license was denied, but Crummer litigated for it and won; in 1944 the Pasco County litigation was commenced, ostensibly by the state, but actually by one Gall, with full knowledge and collaboration with attorneys of appellees; this suit severely attacked Crummer and his operation.[4] In an answer to the Pasco County suit by one Wynn, an intervenor, which answer was fully approved by appellants, it was charged that the suit had been brought as part of a conspiracy between Fuller and others to destroy appellants' business in Florida. Inasmuch as this answer, filed on September 30, 1946, is one of the strongest bits of documentary evidence bearing on the issue of appellants' knowledge of the conspiracy later sued on, we here quote relevant portions of it:

> "The said defendant further states that this suit was instituted in bad faith and with improper motives, and has been so prosecuted to this date as part of a well planned and determined conspiracy and scheme to defeat the defendant, R. E. Crummer and his company's municipal refunding operations in Florida, with the object of eliminating them as a factor in Florida municipal finance, in that, to-wit:
>
> "a. This proceeding is in fact one of a series of attacks made in the Courts, before the United States Securities and Exchange Commission, the Post Office Department, the Florida Securities Commission, the Florida State Board of Administration, and elsewhere by the individuals who, actuated by bad faith and improper motives, procured the institution of the suit in furtherance of the scheme of the said individuals to frustrate, disrupt, and if possible, defeat any and all efforts, operations and activities in the State of Florida, of the defendants, R. E. Crummer and R. E. Crummer and Company.
>
> "b. In January, 1943, one, Walter P. Fuller, of St. Petersburg, Florida, and others prevailed upon the State Securities Commission to deny the application

[4] This suit, too, was finally won by Crummer.

of The Crummer Company for a license to do business within the State of Florida, resulting in the necessity of The Crummer Company's procuring writs of mandamus from the Florida Supreme Court in two successive years in order to obtain a license to do business.

. . . . . .

"j. During the greater part of the period in which the plaintiff, Walter R. Gall, and Walter P. Fuller were busily engaged in promoting this litigation, agents of the Securities Exchange Commission and Post Office Inspector Mansfield were conducting a nationwide investigation of the refunding operations in Florida of R. E. Crummer and Company and its officials and employees, including a complete investigation of the Pasco County 1938 refunding plan. The said Gall and Fuller were working in conjunction with the federal agents not only in Pasco County but elsewhere. The general scheme and conspiracy reached the zenith when criminal indictments were returned against R. E. Crummer, his company, and others by a federal grand jury of the District of Kansas, in August of 1944. The said Gall and Fuller and others of Florida cooperated toward the finding of the indictments with Fuller personally appearing before the federal grand jury in Kansas. . . . ."

In an effort by Crummer to cause the indictments to be dismissed (as they ultimately were), their counsel prepared a written statement which was filed on February 25, 1946. This statement contained a detailed history of Crummer's activities and the opposition of the Ball-duPont interests. It is counted on so heavily by appellees as showing conclusively that appellants knew of the conspiracy for more than three years before suit was filed that we quote it at some length in the margin.[5]

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[5] After stating that "The duPont interests apparently concluded that they had to wage war if their selfish plans, dreams, etc. were to reach fruition on Crummer," the statement also said:

"The duPont interests failed in their fight in the Florida Legislature for they were fighting not only Crummer but the people of the state; they failed in their fight against the enactment of the amendment to the Federal Municipal Bankruptcy

So, too, in January 1947, within the three years limitation period, in a letter to the Department of Justice, Crummer himself recited much the same history and made much the same statement, from which it could be implied that prior to June 30, 1946, he knew of many of the facts that ultimately became the basis of his suit.

These facts are supplemented by the testimony on behalf of Crummer, both by him and Mr. Meredith as well as several lawyers who had made diligent investigation into the several adverse actions taken against Crummer by the state and governmental agencies, all to the effect that they had been unable to connect the appellees, other than Fuller, with any conspiracy to cause the state and federal action; that the first time they were able to do so was on December 27, 1946, when they learned that the initial com-

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Act, because of the over-whelming support urging its enactment; and they failed in their fights in the courts because the merits were against them.

"However, when the agents of the SEC and Post Office Department moved in and took over the front line of attack upon Crummer the course of the battle changed. The potent forces of the Federal Government were too much for Crummer. He was compelled to retreat. And, as a result, for all practical purposes Crummer was eliminated as the prominent figure in the field of Florida public finances. Immediately the duPont interests assumed the position of prominence to such an extent that there now exists a duPont public credit monopoly in Florida. For example: While Crummer was permitted to function in Florida the duPont interests were able in open competition to obtain not more than one-fourth of the authorized refunding bonds, but, since Crummer's elimination the duPont interests and associates have purchased about seventy-five per cent of the volume authorized for which they tendered bids.

"I realize that the Department of Justice is not interested in the success or failure of competitors in any field of endeavor, but I am certain that it is extremely interested in determining whether or not its authority is being used by others as a vehicle to persecute one competitor at the behest of another, and especially where it appears that the competitors have entered into the same type of contract and only one, in the field of many, stands criminally charged."

plaint to the Post Office Department had been made by Main and Wheeler, the former being an official of Ball-duPont and the latter a partner in Leedy, Wheeler & Co. of the Leedy-Pierce group.

It is thus appellants' contention that although they knew they were being opposed and bitterly fought on many fronts by several of the parties who were later joined as defendants in this suit, they were unable to learn of the connection between them that was essential to the existence of a conspiracy until the discovery of the Main-Wheeler activities. Appellants also contend that the discovery of two letters from Ball-duPont to the Florida Securities Commission which came to light within the three year period gave further substantial information tying Ball-duPont into the activities of Fuller and his investigating committee.

It is true that if plaintiffs who sue after the statutory period of limitation following the accrual of a cause of action knew of their cause of action for more than the statutory period before filing suit, the effect of any effort at concealment is ended when knowledge is acquired. As we stated in *Phillips Petroleum Co. v. Johnson*, 5 Cir., 155 F. 2d 185, 191, a case cited by appellees:

> "It is enough for one to know that he has a cause of action, and that representations which before concealed it are not true. A concealment which no longer conceals the cause of action will not continue to toll the statute, though the full facts may not yet have been disclosed."

Appellees argue from this principle and on the authority of *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 7 Cir., 138 F. 2d 967, 971; *Cape Cod Food Products v. National Cranberry Assn.*, 119 F. Supp. 900, 908; and *American Tobacco Co. v. Peoples Tobacco Co.*, 5 Cir., 204 F. 58, 59, 60: "In any conspiracy under the anti-trust laws it is only necessary that you know two or more of the conspirators to bring suit for the things done to the plaintiff." The first two of these cases are not in any way germane to the proposition for which they are cited. The Fifth Circuit case is likewise no authority. In a case in which the opinion repeatedly stated that the conspiracy between all of the named defendants had been fully proved, the court merely approved of the trial court's charge including the statement:

> "In other words, from the moment he knew he could bring an action against somebody to recover his damages, although he might not have known who the person was, or he might not have known how he was going to prove his action, prescription would run."

The Court said:

> "Taking this charge as a whole, we think it fairly presents the question of prescription in this case."

This is so because the charge, if not correct, was more favorable to the appellant there than it was entitled to get at the hands of the trial court. Nor does the case of *Suckow Borax Mines Consolidated* v. *Borax Consolidated Limited*, 9 Cir., 185 F. 2d 196, cert. den. 340 U.S. 943, support this thesis. There the court indicated that the plaintiff had known before the running of the statute all the parties to the conspiracy, the existence of the conspiracy and the damages incurred therefrom. The Court said:

> ". . . The record before the trial court makes clear beyond dispute that at all times pertinent to this inquiry appellants knew and believed that they were being grievously damaged by Borax Ltd. and its subsidiaries and agents and were keenly aware that the acts of appellees had caused and were causing damages, and knew, or had reason to believe, and did believe, that these acts were committed in violation of Federal antitrust laws . . ."

These cases do not stand for the general rule that if an injured party knows that two or more persons have injured him but only later learns that their actions, *together with joint actions of several others* amounted to a conspiracy between *all of them*, the statute commenced in all events to run from the acquisition of knowledge of the actions of the two. It is essentially a question of what conspiracy is charged. In the case before us a jury could well believe that Crummer knew that from improper motives Fuller and his committee, with the assistance of Ball, had attacked him again and again, but it might also have believed that, as Crummer said in his statement to the Department of Justice, these attacks were ineffectual, or, as Crummer said, "negatory," and it was only the arrival of the federal agents on the scene that did him in. He said:

"It was necessary for the duPont interests to eliminate this source of credit in order to gain the dominant position in Florida public finance. To accomplish the objective, the Crummer organization must be discredited, and, if possible, completely annihilated—this Mr. Ball wanted. The fact is, I would frequently hear of his threats to run me out of the State, and of his invitation to other bond dealers to join him in such an effort. *Despite his financial resourcefulness, however, his efforts were negatory until the Federal agents moved in.* The Florida Securities Commission, the SEC, the Post Office Department, the criminal indictments, and Mr. Ball and his satellites were too much for me. I was forced to withdraw, and as a result, a major portion of the most economical source of credit withdrew its credit to and interest in Florida's taxing units." (Emphasis added.)

This is a statement supporting Crummer's contention that he was not damaged and thus the cause of action was not complete until the "Federal agents moved in." It is stipulated that appellants did not learn until December 27, 1946, what caused the Federal agents to "move in." If a jury believes that they moved in as a part of a conspiracy between these appellees to ruin appellants' business and run them out of Florida, which, for the purpose of this appeal, is assumed, then it might well find that Crummer did not have knowledge of *this* conspiracy until he learned that Main and Wheeler started the Federal investigation that, although finally dismissed, did bring about their financial ruin.

So, too, could a jury find that the two letters from Ball to the Florida Securities Commission, one indicating knowledge of the presumedly secret Fuller report and the other immediately preceding the beginning of quo warranto proceedings by the Commission gave a connecting link to tie the Ball-duPont interests to the Fuller investigation and the effort to deprive Crummer of the benefits of his City of Inverness contract.

We think it cannot be said as a matter of law that appellants had knowledge of the existence of the cause of action here sued upon for more than three years prior to the date of suit. This is a fact question and on the record before us should have been left to the jury.

It is next contended by appellees that even though there was a lack of knowledge the proof of fraudulent concealment was lacking. As pointed out by appellees, the Court has said:

> "Mere ignorance of one's rights will not toll the statute of limitations. Concealment by defendant only by silence is not enough. He must be guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry." *Arkansas Natural Gas Co.* v. *Sartor*, 5 Cir., 78 F. 2d 924, reaffirmed in *Hickock Producing and Development Co.* v. *Texas Co.*, 5 Cir., 128 F. 2d 183.

The appellants answer that the very nature of the conspiracy charged, i.e., the fraudulent use by the appellees of the governmental bodies whose investigations are by law largely kept secret necessarily resulted in the degree of concealment which, if successful, would toll the running of the statute. This we have already held. When the case was last here we said:

> "We think it quite clear that plaintiffs' amended complaint does well state their claim that by secretly moving under the guise and protection of the public interest and through the public authorities, the defendants fraudulently intended to and did conceal the scheme and their participation in it." 223 F. 2d 238, 248.

Since, on the issue before the trial court, it assumed the existence of the conspiracy as alleged, see page six, *supra*, we must treat the case as if these quoted allegations "that the appellees did secretly move under the guise and protection of the public interest and through the public authorities" were proved.

As we have previously stated, this case comes here on the assumption that the conspiracy was proved as charged. We do not imply, as we cannot, what the ultimate finding will be on this issue; nor do we say that as a matter of law appellants have shown such lack of knowledge. We think they have shown sufficient facts which, when coupled with the assumptions that we must make on the record, entitled them to have a jury trial on the question of fraudulent concealment.

The judgment is REVERSED and the case REMANDED for further and not inconsistent proceedings.

JUDGMENT

(Extract from Court Minutes of May 8, 1958)

No. 16609

THE CRUMMER COMPANY AND R. E. CRUMMER & COMPANY

versus

JESSIE BALL DUPONT, ETC., ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;

It is further ordered and adjudged that the appellees, Jessie Ball duPont, etc., and others, be condemned, in solido, to pay the costs of this cause in this Court.

APPENDIX C

Statutes Involved

1. Sections 1 and 2 of the Sherman Act (Act of July 2, 1890, 26 Stat. 209, as amended 15 U.S.C. §§ 1, 2) read as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

2. Section 4 of the Clayton Act (Act of October 15, 1914, 38 Stat. 731, 15 U.S.C. § 15) reads as follows:

> "Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

3. Section 95.11 of the Florida Statutes Annotated reads in pertinent part as follows:

> "Fla. Stat. 95.11.—Limitations upon actions other than real actions.—Actions other than those for the recovery of real property can only be commenced as follows:
>
> . . . .

"(5) Within three years.—

"(a) An action upon a liability created by statute, other than a penalty of forfeiture;"

4. The Federal Moratorium Act (Act of October 10, 1942, 56 Stat. 781, as amended 15 U.S.C. note following § 16) reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the running of any existing statute of limitations applicable to violations of the antitrust laws of the United States, now indictable or subject to civil proceedings under any existing statutes, shall be suspended until June 30, 1946, or until such earlier time as the Congress by concurrent resolution, or the President, may designate. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.

"SEC. 2. That this Act shall be in force and effect from and after the date of its passage."

APPENDIX D

MEMORANDUM SUBMITTED TO POST OFFICE DEPARTMENT BY PETITIONERS MAIN AND WHEELER

(Plaintiff's Exhibit No. 1 in the District Court; R. 3125-3132)

On or about December 1, 1939, the Board of County Commissioners of Lee County, Florida, entered into a contract with W. H. Reynolds & Company, a Fort Myers Bond dealer, for the refunding of the County's outstanding Road & Bridge bonds in the amount of $763,000. This contract provided for W. H. Reynolds & Company to endeavor to have the holders of the County's then outstanding Road & Bridge Refunding Bonds exchange same for a new issue of 4% non-callable Refunding Bonds. This contract, which expires on December 1, 1941, was sold and assigned by W. H. Reynolds & Company to R. E. Crummer & Company for a purported sum of $4,000. Thereupon R. E. Crummer & Company assumed the obligations and duties of the fiscal agent for the County under the terms of this contract.

Thereupon the County officials took the proper steps to authorize the 4% non-callable Road & Bridge Refunding Bonds, as provided under the terms of the above referred to contract, and it would be assumed that forthwith the fiscal agent for the County would proceed to offer the new 4% non-callable Road & Bridge Refunding Bonds to the holders of the County's then outstanding 5½% Callable Road & Bridge Refunding Bonds.

It is to be observed that under the Laws of the State of Florida such refunding bonds, when authorized, can be offered at public sale for competitive bids, notice of such intention to sell said bonds being given by publication two times in a newspaper published within the County, the publications to be not less than seven days apart. Therefore, Lee County could have offered all or any unexchanged portion of these bonds at public sale, and from the proceeds of such sale could have called for redemption on January 1, 1941, or any interest payment date, its then outstanding 5½% Road & Bridge Refunding Bonds at 100 and interest.

The provisions for calling for redemption the 5½% Road & Bridge Refunding Bonds of the issue dated

January 1, 1938 were that Notice of such Redemption be filed at the bank of payment not less than thirty days prior to the redemption date, and notice of redemption be published once, not more than sixty and not less than thirty days, prior to the redemption date in a newspaper having general circulation in Lee County, and in a financial paper published in the City of New York.

Prior to December 1, 1940, Lee County, Florida published proper Notice of Redemption covering $80,000 of its outstanding 5½% Road & Bridge Refunding Bonds Issue dated January 1, 1938, which was the issue to be refunded under the terms of the above referred to fiscal agency contract. The numbers of the bonds so called for redemption are included in the exhibits under "2" following. These bonds were to be redeemed at the City Bank Farmers Trust Company, New York City, on January 1, 1941, interest to cease thereon after that date.

Funds for payment of road and bridge bonds are carried with the State Board of Administration, and, in accordance with the usual practice, the Board of County Commissioners notified the State Board of Administration in Tallahassee that these bonds were being called, and requested that the Board remit the necessary funds, $80,000, to retire the bonds so called, and also remit funds sufficient to pay the interest due January 1, 1941 on the Company's 5½% Road & Bridge Refunding Bonds, which interest amounted to $20,982.50. These funds were remitted by the State Board of Administration to the City Bank Farmers Trust Company on December 12, 1940, photostatic copy of the memorandum of remittance appearing under "2" following. No question is raised as to legality of the call on the $80,000 bonds.

Holders of the other Road & Bridge Refunding Bonds of Lee County of the 5½% issue dated January 1, 1938, upon presenting their January 1, 1941 coupons to the City Bank Farmers Trust Company, New York City, the bank of payment, had the coupons returned to them unpaid by that bank with the advice that their bonds had been called for redemption, and that the coupons would be paid when the bonds to which they belonged were surrendered for redemption. Since the County had outstanding a total of $763,000 bonds, of which only $80,000 had been legally called for redemption, it follows that the holders of $683,000 of the County's bonds were so notified that their coupons would be paid only upon surrender of their bonds,

such holders being given to understand that their bonds had been called for redemption although this was not actually the case.

From the photostatic copies under "3" following, which the City Bank Farmers Trust Company furnished the State Treasurer's office showing bonds retired, it appears that $117,000 of the County's bonds were so retired, and this is confirmed in the second paragraph of the Bank's letter under date of April 12th addressed to Mr. J. Edwin Larson, State Treasurer. These $117,000 bonds represent bonds surrendered and paid by the City Bank Farmers Trust Company in addition to the $80,000 bonds legally called. There is some reason to believe that a total of $293,000 bonds, in addition to the $80,000 bonds legally called, have been surrendered, but the difference between $293,000 and $117,000 may represent bonds that were voluntarily surrendered for exchange. If such is the case, the holders would have been approached by R. E. Crummer & Company, as fiscal agent for the County, and offered the opportunity to exchange their bonds. There is no evidence, however, that such an opportunity to exchange was extended generally to holders of the County's bonds by the fiscal agent.

Under "4" and "5" following, appear copies of the correspondence between bondholders of bonds which were not included in the regular Notice of Redemption, but which were surrendered pursuant to the Bank's advice that the bonds had been called for redemption.

In addition to the correspondence enclosed, it is to be noted that the [illegible] Corporation, located in the First National Bank Building, Miami, Florida, of which Lawrence DeC. Romph is President, states they have a letter in their files from R. E. Crummer & Company in which the latter states that the Lee County, Florida Optional 5½% Road & Bridge Refunding Bonds dates January 1, 1938, were "called informally through notices in the mail". Mr. Pierce Markham, Trust Officer of the Florida National Bank in Jacksonville, had some correspondence and telephonic conversation with the County officials regarding bonds held by the Bank in its Trust Department, and which the Bank refused to surrender. The Atlantic National Bank in Jacksonville, James A. Cranford, Vice President, represented bonds of the Bank's customers, which they refused to surrender. Miss Josephine Stadler, a resident of Ft. Myers, is reported to have owned $35,000 Lee County Road & Bridge

5½% Refunding Bonds of the issue dated January 1, 1938, which were not included in the regular Notice of Redemption, but which she surrendered upon notice by the City Bank Farmers Trust Company that her bonds had been called.

The State Administration changed early in January 1941, and the new State Board of Administration, upon this situation being brought to its attention, communicated with the Lee County officials, and the Board of County Commissioners on January 29, 1941 rescinded the resolution of December 21, 1940 which required the surrender of uncalled bonds before payment of the January 1, 1941 coupons. This appears under "2" following. It is to be noted also that on the copy of letter, under "5" following, of the Lewis State Bank dated January 28, 1941, addressed to the Board of County Commissioners, the reply of the Clerk of the Circuit Court, D. T. Farabee, appearing on the bottom of the Lewis State Bank's letter, states "The above referred to bonds were not legally called—."

An examination of the facts and data available indicates that an attempt was made on the part of the County or the fiscal agent, R. E. Crummer & Company, or both, to make it appear to the holders of Lee County 5½ Road & Bridge Refunding Bonds of the issue dated January 1, 1938 (other than the $80,000 legally called) that their bonds had been called for redemption of [on] January 1, 1941 when in fact the bonds had not been so called for redemption. The bondholders, upon receiving such advice from the New York bank of payment, assumed that their bonds had been called and consequently surrendered them.

It further appears that funds to pay such bonds (in addition to the $80,000 bonds which admittedly were legally called) were supplied by the First National Bank of Chicago to the Guaranty Trust Company in New York City under arrangements made with R. E. Crummer & Company (note resolution, Board of County Commissioners, December 21, 1940), and that upon the bonds being presented to the City Bank Farmers Trust Company for payment they were presented by that Bank to the Guaranty Trust Company and payment made by the latter, the bonds thereupon being delivered to the order of R. E. Crummer & Company in uncanceled form, (resolution Board of County Commissioners, December 21 1940). Thus the County or its fiscal agent, or both were able to acquire at a

cost of 100, under pretense that the bonds had been called for redemption, at least $117,000 of bonds which had not been called for redemption and which continued to bear interest at the rate of 5½% per annum.

Funds for this purpose must have been furnished by the fiscal agent or someone else. This is evidenced by the fact that on December 1, 1940 Lee County had on deposit in its Interest & Sinking Fund Account with the State Board of Administration the sum of $126,336.92, and would receive during the month of December approximately $12,500, making available in its Interest & Sinking Fund Account, the end of December, the sum of approximately $138,856.92. On January 1, 1941 Lee County had the following payments which were due:

Principal	$ 3,500.00
Interest	30,154.50
Bonds called for Redemption	80,000.00
Total	113,654.50

After remittance for these items by the State Board of Administration out of these funds, the County had a balance left in its Interest & Sinking Fund Account with the Board of Administration the sum of $26,203.42. Since this balance, plus the items paid, total $139,837.92 it is apparent that the County did not use any of its funds for the retirement of the bonds, other than the $80,000 legally called.

It is reported that the minute books of the Board of County Commissioners of Lee County, under date of February 19, 1941, contain a resolution instructing the First National Bank in Chicago to surrender the Refunding Bonds of the issue dated January 1, 1938 to the State Board of Administration for cancellation, and to issue to R. E. Crummer & Company the new Refunding 4% Bonds in exchange therefor, and to adjust interest as of February 19th, the County paying 5½% interest on the old bonds surrendered up to that date.

It thus appears that the County or the fiscal agent, or both, were able to secure the 5½% Bonds of the issue of 1938 at a cost of 100 by representing them as having been called for redemption when in fact they were not, and at a later date exchanging them for new refunding bonds which, being non-callable 4% Bonds, were worth a premium.

The machinery of this appears to have been the con-

nivance of the County officials and the fiscal agent who made it appear to the bondholders that their bonds had been called by having the New York bank of payment so advise them upon presentation of their January 1, 1941 coupons. Funds for the payment of such bonds were furnished to the Guaranty Trust Company of New York by the First National Bank of Chicago, and upon bonds being surrendered to the City Bank Farmers Trust Company they were delivered to the Guaranty Trust Company who made payment therefor to the City Bank Farmers Trust Company, who in turn remitted to the bondholders. The Guaranty Trust Company in turn and "to the order of R. E. Crummer & Company" sent the uncanceled bonds to the First National Bank of Chicago where they were held until the passage of resolution by the Board of County Commissioners on February 19, 1941, at which time they were exchanged for the new 4% Refunding Bonds. Thus at a cost of 100, R. E. Crummer & Company acquired the noncallable 4% Road & Bridge Refunding Bonds of Lee County, in an amount at least of $117,000, these being worth in excess of 100, by misrepresenting to the bondholders that their bonds had been called.

The Board of Administration is composed of the Governor, State Comptroller and State Treasurer. The Attorney General acts as attorney for this Board.

(1850-7)